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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 JANET LOUISE BRYANT,
8 Plaintiff,

Case No. 2:16-cv-01607-RFB-CWH

ORDER

9 v.

10 NANCY A. BERRYHILL, Acting
11 Commissioner of Social Security,¹
12 Defendant.

13 **I. INTRODUCTION**

14 Before the Court is Plaintiff Janet Louise Bryant's ("Bryant") Motion for Reversal and
15 Remand, ECF No. 20, and Defendant Nancy A. Berryhill's (the "Commissioner") Cross-Motion
16 to Affirm, ECF No. 24.

17
18 **II. BACKGROUND**

19 **a. Procedural Background**

20 Bryant applied for social security benefits and supplemental security income under Title II
21 and Title XVI of the Social Security Act (the "Act") on June 18, 2012, alleging disabling
22 impairments as of April 20, 2008. AR 22, 45, 169–93, 278. The Social Security Administration
23 ("Administration") denied Bryant's application in October 2012 and again upon reconsideration
24 in April 2013. AR 88–94, 98–103.

25 On Bryant's request, the Administrative Law Judge ("ALJ") conducted a hearing regarding
26 Bryant's application on February 26, 2014. AR 39–44, 105–07. On November 14, 2014, the ALJ

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28 ¹ Nancy A. Berryhill, as successor to Carolyn W. Colvin, is automatically substituted as Defendant in this matter under Federal Rule of Civil Procedure 25(d).

1 issued his decision, finding Bryant was not disabled under the Act. AR 19–32. The decision
2 became final when the Appeals Council denied Bryant’s request for review on May 2, 2016.
3 AR 1–6.

4 **b. Factual Background**

5 Bryant alleged the following impairments: myocardial infarction, low back pain, chronic
6 hand pain secondary to a remote wrist fracture and osteoarthritis, chronic left shoulder pain
7 secondary to tendinitis and osteoarthritis, chronic leg and foot pain, chronic migraines, bilateral
8 hearing loss, and depression. AR 24, AR 279.

9 The ALJ conducted a hearing in February 2014 after the initial denials of Bryant’s
10 application. AR 39–44. Bryant was represented by counsel at the hearing. Id. The ALJ granted
11 Bryant’s request to leave the administrative record open for two weeks after the hearing to
12 supplement her medical records and provide additional briefing. AR 42–43. The ALJ then
13 questioned Bryant about her last date of employment and her medical insurance coverage. AR
14 43–44. Bryant offered no additional testimony; her counsel asked her no questions. See AR 39–
15 44. In concluding the hearing, the ALJ explained that Bryant’s attorney may supplement the record
16 within the next two weeks and may submit an additional brief thereafter. Id. The ALJ also
17 explained that another hearing would be needed only if he had any additional questions. AR 44.
18 No additional briefing was provided. See generally AR.

19 The ALJ issued his decision on November 14, 2014. AR 19–32. The ALJ first found that
20 Bryan had not engaged in substantial gainful activity since April 20, 2008. AR 24. The ALJ then
21 found that Bryant had two severe impairments under the Act: (1) cerebrovascular disease/ischemic
22 heart disease and (2) degenerative disc disease. Id. The ALJ determined that the other alleged
23 disabilities, including Bryant’s depression, were not severe. Id. Regarding Bryant’s allegations
24 of major depression, the ALJ found:

25 Although the claimant alleged depression, there is no evidence of treatment with a
26 mental health professional and the providers do not reference behavioral
27 abnormalities within the progress notes. Accordingly, I accept the assessment of
28 the state agency medical consultant and find no restrictions/difficulties in activities
of daily living, maintain social functioning, or maintaining concentration
persistence or pace, and no episodes of decompensation (20 CFR, Part 404, Subpart
P, Appendix 1; Exhibit 8A). Because the claimant’s medically determinable mental
impairment causes no more than “mild” limitation in any of the first three functional

1 areas and “no” episodes of decompensation which have been of extended duration
2 in the fourth area, it is nonsevere (20 CFR 404.1520a(d)91); 416.920a(d)(1)).

3 AR 24–25. The ALJ then determined that Bryant’s impairments did not amount to the medical
4 equivalent of an impairment demanding a finding of disability. AR 25.

5 The ALJ continued in the disability evaluation process by deciding Bryant’s residual
6 functional capacity (“RFC”).² Id. In deciding Bryant’s RFC, the ALJ first noted that Bryant failed
7 to complete a function report and did not testify as to her specific limitations resulting from her
8 alleged impairments. Id. He then considered medical evidence on file and found that Bryant
9 maintained an RFC to perform a range of medium work in an unskilled capacity. Id. Based on
10 the determined RFC and assuming her past work was unskilled, the ALJ concluded that Bryant
11 could perform a significant number of jobs existing in the national economy. AR 27.

12 Bryant’s medical records show a history of depression. Bryant was taken to Kaiser
13 Foundation Hospital Emergency Department on April 20, 2008. AR 366–68. Carol Schaffer,
14 M.D., treated Bryant, diagnosing her with a first-time seizure. AR 368. Anima Mathur, M.D.,
15 also examined Bryant during her hospitalization, noting her mental status as “alert, oriented x 3”.
16 AR 373. But at discharge, Bryant’s medication regimen was noted as including multiple
17 antidepressants. AR 433, 436.

18 At a weight management appointment on June 25, 2008, Rubi Myrick, RD CDE, noted that
19 Bryant explained she had a history of depression and was taking depression medication. AR 475.

20 Bryant was diagnosed with major depression disorder by Daniel Dal Cordo, Psy.D., on
21 April 15, 2009. AR 494–95. Dr. Dal Cordo described Bryant as “depressed, anxious, angry and
22 sad”. AR 495. He assigned her a distress level of 9 out of 10. Id. He recommended that Bryant
23 schedule a follow up appointment with another doctor and ask for a “depression CBT group.” AR
24 496.

25 In October 2009, Brian Joseph, M.D., listed major depression as a current health issue after
26 reviewing Bryant’s patient medical history. AR 505. He was treating Bryant for rib pain. Id.

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28 ² RFC is defined as the most an individual is capable of doing in a work setting despite the
individual's impairments and related symptoms, such as pain. 20 C.F.R. § 416.945(a)(1).

1 On December 16, 2011, Bryant returned to the emergency department out of fear she was
2 suffering a stroke. AR 558. Michael Madland, M.D., stated that Bryant entered the emergency
3 department with an “altered level of consciousness.” AR 553. The report notes Bryant’s history
4 of major depression. AR 553–54. She also reported feelings of “significant stress and anxiety.”
5 AR 553. Scott Abramson, M.D., also noted that Bryant was “very upset” and “tearful” during her
6 examination. AR 558.

7 In his decision, the ALJ relied on records detailing physical ailments as well as the reports
8 of two reviewing medical consultants: Thomas Phillips, M.D., and G. Lee, M.D. AR 26.

9 In the report by Dr. Phillips, the summary of an analysis on Bryant’s mental status reads:
10 “Claimant does not allege any mental issues. Records show in April 2009 she was diagnosed with
11 depression after being seen with relationship problems. [...] Claimant has not seen a QMHP for
12 treatment and was put on Wellbutrin from her PCP.” AR 57. After recognizing a treating
13 physician made the major depression diagnosis, Louis Perrot, Ph.D., concluded that “any impact
14 [her mental illnesses] may have on her functioning would not be more than a mild effect.” AR 58.
15 He opined that Bryant maintained an RFC to perform a range of medium work and was not
16 disabled. AR 61.

17 Dr. Lee also opined that Bryant was not disabled and maintained an RFC to perform a
18 range of medium level work. AR 72–73. Nadine Genece, Psy.D., agreed in the same report that
19 Bryant did not have any limiting mental illnesses. AR 69.

21 III. LEGAL STANDARD

22 42 U.S.C. § 405(g) provides for judicial review of the Commissioner's disability
23 determinations and authorizes district courts to enter “a judgment affirming, modifying, or
24 reversing the decision of the Commissioner of Social Security, with or without remanding the
25 cause for a rehearing.” In undertaking that review, an ALJ’s “disability determination should be
26 upheld unless it contains legal error or is not supported by substantial evidence.” Garrison v.
27 Colvin, 759 F.3d 995, 1009 (9th Cir. 2014) (citation omitted). “Substantial evidence means more
28 than a mere scintilla, but less than a preponderance; it is such relevant evidence as a reasonable

1 person might accept as adequate to support a conclusion.” Id. (quoting Lingenfelter v. Astrue, 504
2 F.3d 1028, 1035 (9th Cir. 2007)) (quotation marks omitted).

3 “If the evidence can reasonably support either affirming or reversing a decision, [a
4 reviewing court] may not substitute [its] judgment for that of the Commissioner.” Lingenfelter,
5 504 F.3d at 1035. Nevertheless, the Court may not simply affirm by selecting a subset of the
6 evidence supporting the ALJ's conclusion, nor can the Court affirm on a ground on which the ALJ
7 did not rely. Garrison, 759 F.3d at 1009-10. Rather, the Court must “review the administrative
8 record as a whole, weighing both the evidence that supports and that which detracts from the ALJ's
9 conclusion,” to determine whether that conclusion is supported by substantial evidence. Andrews
10 v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995).

11 The Social Security Act has established a five-step sequential evaluation procedure for
12 determining Social Security disability claims. See 20 C.F.R. § 404.1520(a)(4); Garrison v. Colvin,
13 759 F.3d 995, 1010 (9th Cir. 2014). At step two, the Administration “consider[s] the medical
14 severity of the [claimant’s] impairment(s).” 20 C.F.R. § 404.1509(a)(4)(ii). The Administration
15 will conclude that a claimant is not disabled if the claimant has neither “a severe medically
16 determinable physical or mental impairment that meets the duration requirement in § 404.1509, or
17 a combination of impairments that is severe and meets the duration requirement[.]” Id.

18 During the disability evaluation process, an ALJ “has an independent duty to fully and
19 fairly develop the record and to assure that the claimant’s interests are considered.” Tonapetyan
20 v. Halter, 242 F.3d 1144, 1150 (9th Cir. 2001) (internal quotations omitted). The duty is triggered
21 when the record evidence is ambiguous or when the ALJ finds the record is inadequate to allow
22 for proper evaluation. Id. The ALJ may discharge the duty by “subpoenaing the claimant's
23 physicians, submitting questions to the claimant's physicians, continuing the hearing, or keeping
24 the record open after the hearing to allow supplementation of the record.” Id. Although the duty
25 is heightened when a claimant is unrepresented, it also applies when a claimant is represented by
26 counsel. Id. Further, despite the duty, the claimant “is ultimately responsible for providing the
27 evidence to be used in making the RFC finding.” Widmark v. Barnhart, 454 F.3d 1063, 1068–69
28 (9th Cir. 2006). The claimant also bears the burden of showing prejudice from an ALJ’s error.

1 McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011). While “the reviewing court can determine
2 from the circumstances of the case that further administrative review is needed to determine
3 whether there was prejudice from the error,” the “mere probability [of prejudice] is not enough.”
4 Id.

6 **IV. DISCUSSION**

7 The parties dispute a single issue: whether the ALJ sufficiently developed the record to
8 determine Bryant’s mental health status and its effect on her RFC. Bryant argues the ALJ erred
9 by determining Bryant’s major depression disorder was not severe by relying on an insufficient
10 administrative record instead of ordering a functional assessment. The Commissioner responds
11 that the administrative record adequately supports the ALJ’s decision because it shows: Bryant
12 received only minimal and conservative treatment for her depression; Bryant’s medical state was
13 unremarkable during multiple examinations conducted for other ailments; and the two reviewing
14 reports contained opinions from experts in the specific field that Bryant’s depression had at most
15 a mild effect on her daily functioning. The Commissioner also argues the ALJ satisfied any duty
16 to develop the administrative record by leaving the administrative record open for two weeks after
17 the February 2014 hearing for supplementation purposes. The Court agrees with the
18 Commissioner.

19 To begin, the Court turns to the February 2014 hearing, at which Bryant was represented
20 by legal counsel. The ALJ indicated that the record was neither ambiguous nor inadequate at the
21 hearing. He specifically explained how the matter would proceed: the administrative record would
22 remain open for two weeks based on Bryant’s request; he would consider any additional medical
23 evidence and briefing; he would issue a decision unless he had any unresolved questions, in which
24 case another hearing would result. Through this explanation, the ALJ communicated his intent to
25 decide the matter on the administrative record unless Bryant raised an issue requiring additional
26 clarification. Bryant, through her counsel, did not attempt to offer any testimony at the hearing.
27 Bryant also failed to provide any supplemental brief despite the opportunity to do so. The ALJ
28 therefore decided the matter on the administrative record, which contains substantial evidence to

1 support the ALJ's decision, *e.g.*, the reviewing physician's opinions. See Thomas v. Barnhart, 278
2 F.3d 947, 957 (9th Cir. 2002) ("The opinions of non-treating or non-examining physicians may
3 also serve as substantial evidence when the opinions are consistent with independent clinical
4 findings or other evidence in the record.").

5 Further, the ALJ discharged his duty to supplement the administrative record even if it
6 were ambiguous or inadequate at the time of the hearing by ordering that the administrative record
7 remain open for two weeks after the hearing. Tonapetyan, 242 F.3d at 1150 (recognizing the ALJ
8 may discharge his duty to supplement the administrative record by "keeping the record open after
9 the hearing to allow supplementation of the record."). Bryant, who bears the ultimate burden for
10 proving her disability, did not act on the opportunity to provide further briefing or substantial
11 evidence to suggest disabling depression in light of the multiple mental health notes and reviewing
12 physician's opinions.

13 Moreover, if the ALJ relied on an ambiguous or inadequate administrative record, Bryant
14 has failed to satisfy another burden: demonstrating prejudice. Bryant argues that "if new
15 information relating to physical information was received, it could have limited [Bryant] to less
16 than medium work." ECF No. 20 at 7. However, under McLeod, the mere possibility of prejudice
17 cannot suffice. Bryant has not pointed to any information or reasoning specifically allowing this
18 Court to find more than a probability of prejudice.

19 Finally, Bryant focuses her argument on the effect her depression could possibly have on
20 her RFC calculation. Bryant argued in her brief before the ALJ that she should be limited "to
21 unskilled work due to psychological impairments and medication side effects." AR 279. The
22 ALJ's findings comport with the limitation sought by Bryant; the ALJ found Bryant's past-relevant
23 work to be unskilled. Based on the overall record providing support for the ALJ's determination
24 and Bryant's failure to point to any evidence or reasoning to support a finding of prejudice, the
25 Court finds Bryant failed to meet her burden. The Court denies her motion accordingly.

26 27 V. CONCLUSION

28 **IT IS ORDERED** that Plaintiff Janet Louise Bryant's Motion for Reversal and Remand

1 (ECF No. 20) is DENIED.

2 **IT IS FURTHER ORDERED** that Defendant Nancy A. Berryhill's Motion to Affirm
3 (ECF No. 24) is GRANTED. The Clerk of Court is ordered to close this case.

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5 DATED: October 30, 2018.



7 **RICHARD F. BOULWARE, II**
8 **UNITED STATES DISTRICT JUDGE**